Office-Supreme Court, U.S.
FILED
JUL 10 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1960

In the Supreme Court of the United States

OCTOBER TERM, 1983

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROBERT D. BOURGOIN
General Counsel
Federal Maritime Commission
Washington, D.C. 20573

BEST AVAILABLE COPY

TABLE OF AUTHORITIES

Page

Cases:

Cook v. *Hudson*, 429 U.S. 165 4

Magnum Import Co. v. *Coty*, 262 U.S. 159 4

Rice v. *Sioux City Memorial Park Cemetary, Inc.*, 349 U.S. 70 4

Statutes:

Maritime Labor Agreements Act of 1980, Pub. L. No. 96-325, §§ 3, 4, 94 Stat. 1021, 46 U.S.C. (Supp. V) 814 1

Shipping Act of 1916, 46 U.S.C. (& Supp. V) 801 *et seq.*:

§ 15, 46 U.S.C. (& Supp. V) 814 ..... 1, 2, 3

§ 22, 46 U.S.C. 821 3

§ 22(a), 46 U.S.C. (Supp. V) 821(a) 3, 4

§ 45, 46 U.S.C. (Supp. V) 841c 2

Shipping Act of 1984, Pub. L. No. 98-237, 98 Stat. 67 *et seq.* 3

§ 5(d), 98 Stat. 71-72 ..... 3, 4

§ 20(e)(2), 98 Stat. 90 4

§ 21, 98 Stat. 90 3

Miscellaneous:

H.R. Conf. Rep. 98-600, 98th Cong., 2d Sess. (1984) 4

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1960

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

---

1. Section 15 of the Shipping Act of 1916, 46 U.S.C. (& Supp. V) 814, requires ocean common carriers and marine terminal operators serving them to file with the Federal Maritime Commission (FMC) agreements among themselves affecting competition. To the extent the Commission approves such agreements, they are exempt from the operation of the antitrust laws (*ibid.*).

By the Maritime Labor Agreements Act of 1980 (MLAA), Pub. L. No. 96-325, §§ 3, 4, 94 Stat. 1021 (codified at 46 U.S.C. (Supp. V) 814) (Pet. App. A38-A40), Congress terminated the FMC's Section 15 jurisdiction over all collective bargaining contracts and interemployer agreements implementing such contracts, except to the extent such agreements impose assessments to "provide for the funding of collectively bargained fringe benefit obligations on other

than a uniform man-hour basis" (46 U.S.C. (Supp. V) 841c). Under the MLAA, assessment agreements that remain subject to Section 15 are deemed approved upon filing, but the Commission shall upon complaint disapprove any that it finds to be "unjustly discriminatory or unfair as between carriers, shippers, or ports, or to operate to the detriment of the commerce of the United States" (46 U.S.C. 814). The MLAA amendments to Section 15 further provide that in case of conflict between its provisions and any other section of the Shipping Act with respect to assessment agreements, "the provisions of this paragraph shall control" (*ibid.*).

The agreement at issue in this case — designated "LM-81" by the FMC — is an assessment agreement negotiated by petitioners International Longshoremen's and Warehousemen's Union (ILWU) and Pacific Maritime Association (PMA), a multiemployer bargaining organization. LM-81 reduces the financial burden of funding certain employee fringe benefit programs for PMA members who operate dockside "container freight stations," sites at which shipping containers are "stuffed" and "unstuffed" by deep-sea longshoremen represented by the ILWU (Pet. App. A44-A48).

Respondents California Cartage Company, Container-freight Terminals Company, and Hawaiian Pacific Freight Forwarding, each of which operates container freight stations off the docks with employees not represented by the ILWU, protested the agreement as unlawful under the MLAA. After hearing, an FMC administrative law judge issued an initial decision concluding that LM-81 is not an "assessment agreement" over which the Commission has jurisdiction under the MLAA (Pet. App. A21-A22). On administrative appeal, the Commission found that LM-81 *was* an assessment agreement (*id.* at A27-A29), but did not reach the merits because it held that the protestants did not have standing under the MLAA — an Act it construed "to

afford a forum to those who directly or indirectly pay assessments to challenge their fairness," and not to those who challenge "an assessment agreement [because of its adverse impact] on the competitive positions of * * * third parties" (*id.* at A32 (footnote omitted)). The Commission concluded that application of the broad standing provision of Section 22(a) of the Shipping Act, 46 U.S.C. (Supp. V) 821(a), which allows "[a]ny person" to file a complaint (*ibid.*), would "appear to be inconsistent with the scheme of the MLAA" (Pet. App. A31).

The court of appeals reversed the Commission (Pet. App. A17). It held that Section 22 gave the protestants standing, finding that the standing provision of Section 22 did not clearly conflict with the MLAA and that Congress did not intend to circumscribe the application of Section 22 (Pet. App. A12-A13). Alternatively, the court found that Section 15's "detriment to commerce" standard protected competitive interests such as protestants' and independently conferred standing by bringing them within the "zone of interests" protected by the MLAA (Pet. App. A13-A17).

2. The United States and the FMC defended the Commission's decision in the court of appeals and will do so again in this Court if certiorari is granted. However, because of supervening legislation, the legal issue presented by the Petition no longer has continuing importance for the administration of the maritime laws. The case thus does not merit further review.

On March 20, 1984 — after the court of appeals' decision — the President signed into law the Shipping Act of 1984, Pub. L. No. 98-237, 98 Stat. 67 *et seq.* Section 5(d) of the Act (98 Stat. 71), which governs all labor-related assessment agreements filed with the Commission after June 17, 1984 (§ 21, 98 Stat. 90), provides that: "Except for this subsection and section 7(a) of this Act [granting antitrust immunity], this Act, the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933, do not apply to assessment

agreements" (§ 5(d), 98 Stat. 72). Thus, the liberal standing provisions of Section 22(a) of the Shipping Act of 1916, 46 U.S.C. (Supp. V) 821(a), and its cognate provisions under the 1984 Act, cannot be applied under the new Act. According to the Joint Conference Committee Report: "Under existing law and under both bills, the remedies and regulatory standards applicable to assessment agreements are intended to be exclusive. In making this explicit, the conferees have reconciled the two versions to preclude any inference that the many new and restated provisions in the bill respecting rate, conference, and terminal regulation are also to be applied to assessment agreements." H.R. Conf. Rep. 98-600, 98th Cong., 2d Sess. 30 (1984).

Moreover, the new Section 5(d) omits the "detriment to commerce" standard which the court of appeals had held to protect the protestants here. Under the new Act, assessment agreements may be disapproved only if they are "unjustly discriminatory or unfair as between carriers, shippers, or ports" (§ 5(d), 98 Stat. 71). In addition, the legislative history indicates that "assessment adjustments" — which are useful only to those who, unlike protestants, pay assessments — are to constitute the exclusive damage remedy under the Act.

Because Congress has effectively overruled the court of appeals prospectively, the questions presented here are unlikely to arise in the future. See Shipping Act of 1984, § 20(e)(2), 98 Stat. 90. This decision affects only the parties to the immediate litigation, and is of insufficient importance to warrant review by this Court. See, *e.g.*, *Cook* v. *Hudson*, 429 U.S. 165, 165-166 (1976) (per curiam) (certiorari dismissed because of supervening state statute); *Rice* v. *Sioux City Memorial Park Cemetary, Inc.*, 349 U.S. 70, 74 (1955) (same); *Magnum Import Co.* v. *Coty*, 262 U.S. 159, 163 (1923).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

ROBERT D. BOURGOIN
General Counsel
Federal Maritime Commission

JULY 1984